AH SAN

v.

MAJLIS BANDARAYA IPOH & ORS

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: A-02-510-97]
24 OCTOBER 1998

CIVIL PROCEDURE: *Declaratory judgment - Application for - Whether there is time limit - Whether leave of court required - Whether comes within purview of O. 53 r. 1A of Rules of the High Court 1980*

PUBLIC AUTHORITIES: *Remedies - Declaration - Town planning - Building approval granted in disregard of earlier permit - Whether damages an adequate remedy - Town and Country Planning Act 1976, ss. 21(6), 25(7)*

The appellant was the owner of land in respect of which she had obtained planning approval for a two-storey shop with side windows overlooking a lane reserve. The first respondent ('the Council') subsequently granted building approval ('the building approval') to the second respondent to build on the lane reserve.

The appellant sought a declaratory order that the building approval was null and void, contending that it was *mala fide* and a violation of her rights as: (i) it would deprive her of the side windows overlooking the lane reserve; (ii) her corner lot would become an intermediate lot; and (iii) no notice of planning permission had been served on her. The appellant also sought an interim injunction to restrain the second and fourth respondents from building on the lane reserve.

The Council argued that its error was not fatal and could be corrected by modifying the building plans and compensating the appellant under s. 25(7) of the Town and Country Planning Act 1976.

The trial judge held that the fault laid with the Council and also the State Authority which had alienated the lane reserve, but which had not been named as a party. However, he found that damages was an adequate remedy and that the appellant's building plans could be modified.

At the appeal, the Council raised a preliminary objection that in cases of judicial review, applications for *certiorari* required leave of court and had to be made within six weeks of the decision, and that the appellant's failure to do so was fatal.

Held:
Per Abdul Malek Ahmad JCA

[1] As this was an application for a declaratory judgment and not judicial review, the time limit of six weeks did not apply.

[2] The learned trial judge was correct in refusing the injunction based on the reasons given.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu merupakan tuanpunya bagi tanah terhadap mana beliau telah mendapatkan kelulusan perancangan bagi sebuah kedai dua tingkat dengan tingkap tepi yang menghala ke arah sebuah rizab lorong. Responden pertama ('Majlis tersebut') telah kemudiannya memberikan kelulusan binaan ('kelulusan binaan tersebut') kepada responden kedua untuk membina di atas rizab lorong berkenaan.

Perayu telah memohon untuk sebuah perintah perisytiharan bahawa kelulusan binaan tersebut adalah batal dan tak sah, dengan menegaskan bahawa ianya adalah *mala fide* dan suatu pelanggaran akan hak-haknya kerana: (i) ianya akan melucutkannya dari pemandangan tingkap tepi ke hala rizab lorong berkenaan; (ii) lot penjurunya kini akan menjadi lot pertengahan; dan (iii) tidak ada sebarang notis kebenaran perancangan yang telah disampaikan ke atasnya. Perayu juga telah memohon untuk satu injunksi interim (sementara) untuk menghalang responden-responden kedua dan keempat daripada membina di atas rizab lorong berkenaan.

Majlis tersebut telah menghujah bahawa kesilapan berkenaan bukannya tidak dapat dipulihkan (fatal) malahan dapat diperbaiki dengan mengubahsuai pelan-pelan bangunan dan membayar pampasan kepada perayu di bawah s. 25(7) Akta Perancangan Bandar dan Desa 1976.

Hakim perbicaraan telah memutuskan bahawa kesilapan di sini terletak di pihak Majlis tersebut dan juga Pihak Berkuasa Negeri yang telah memberimilik rizab lorong, tetapi yang mana telah tidak dinamakan sebagai satu pihak. Walaubagaimanapun, beliau mendapati bahawa gantirugi merupakan suatu remedi yang memadai dan bahawa pelan-pelan bangunan perayu dapat diubahsuaikan.

Di peringkat rayuan, Majlis tersebut telah mengutarakan suatu bantahan awal bahawa dalam kes-kes kajian semula kehakiman, permohonan bagi *certiorari* memerlukan kebenaran mahkamah dan perlu dibuat dalam tempoh masa enam minggu daripada tarikh keputusan dan bahawa kegagalan perayu untuk berbuat demikian tidak dapat dipulihkan lagi (fatal).

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Oleh kerana ini merupakan sebuah permohonan bagi penghakiman perisytiharan dan bukannya kajian semula kehakiman, had masa selama enam minggu tidak terpakai.

[2] Tuan hakim perbicaraan yang bijaksana telah betul pertimbangan dalam menolak injunksi dengan berdasarkan kepada alasan-alasan yang telah diberi.

[Rayuan ditolak dengan kos.]

Case(s) referred to:
Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1947] 2 All ER 680 ***(refd)***
Hunter & Ors v. Canary Wharf Ltd [1997] AC 655 ***(refd)***
Yahya Kassim v. Government of Malaysia & Anor [1998] 1 CLJ 43 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 53 r. 1A
Town and Country Planning Act 1976, ss. 21(6), 25(7), (8), (9)

For the appellant - Chan Kok Keong (Yau Wai Leong with him); M/s Chan & Assoc
For the 1st respondent - A Silvanathan (Shanti Sankey with him); M/s Kean Chye & Sivalingam
For the 2nd & 4th respondents - Lee Pooi Mun; M/s Khong & Son

[Appeal from High Court, Ipoh; Civil Suit No: 22-88 of 1997]

Reported by Anne Khoo

JUDGMENT

Abdul Malek Ahmad JCA:

At the commencement of the appeal before us, learned counsel for the appellant, who was the plaintiff in the court below, produced his outline of submissions and told the court that planning permission was granted to his client on 24 December 1996 and the writ was filed on 18 July 1997.

Our immediate response was that for judicial review, it must be filed within a certain time limit whereupon learned counsel for the first respondent promptly referred us to the case of *Yahya bin Kassim v. Government of Malaysia & Anor* [1998] 1 CLJ 43; [1997] 3 MLJ 749 where this court had ruled that applications for an order of *certiorari* to quash a decision must be made within six weeks of the decision in question pursuant to

O. 53 r. 1A of the Rules of the High Court 1980. It further ruled that leave is required before the substantive application can be filed and that the failure to apply within the time limit is usually fatal.

Learned counsel for the appellant asked for time to get instructions which we granted. About an hour later, the case was recalled whereupon learned counsel for the appellant told us that although the case cited was against him, there were a number of Supreme Court decisions to the contrary. He added that in England an application is only refused when there is unreasonable delay. On their part, they only knew in June 1997 when the fourth defendant went into the relevant lane reserve. However, he conceded that even if they took 1 June 1997, the writ would still have been late by two days. Nevertheless, he stressed that this point was not in issue in the court below and all that he was asking for was a right of hearing.

The reply from learned counsel for the first respondent, in a change of stance in a manner conceding that leave was not applicable in this instance, was that this was not a case for judicial review as it is for a declaratory judgment. He submitted that the right to be heard does not arise referring to s. 21(6) of the Town and Country Planning Act 1976 (hereinafter "the Act") which reads:

> (6) If the proposed development is located in an area in respect of which no development plan exists for the time being, then, upon receipt of an application for planning permission, or, where directions have been given under subsection (3), upon compliance with the directions, the local planning authority shall, by notice in writing served on them, inform the owners of the lands adjoining the land to which the application relates of their right to object to the application and to state their grounds of objection within twenty-one days of the date of service of the notice.

He also referred to s. 25 of the Act which does not give an aggrieved party the right to be heard as it only provides for the amount of compensation to be offered to the aggrieved party should he be dissatisfied. Section 25(9) of the Act states:

> (9) If any person is aggrieved by the amount of any reimbursement or compensation offered or paid to him under this section, he may, within the time and in the manner prescribed, appeal to the Appeal Board and the Appeal Board shall assess the amount of reimbursement or compensation to be paid.

He further cited the case of *Hunter & Others v. Canary Wharf Ltd.* [1997] AC 655 where it was held, in dismissing the plaintiffs' appeal in the first action, that an owner was entitled to build on his land as he wished, subject to planning control, and was not generally liable, in the absence of an easement or agreement, if his building interfered with his neighbours' enjoyment of their land; and that, accordingly, since the interference with the plaintiffs' reception

of television signals was the result simply of the presence of the building on the defendants' land, no action in private nuisance lay in respect of such interference. In the instant appeal, the interference was the loss by the appellant of the view of the side windows.

Learned counsel for the second and fourth respondents argued that there was no cause of action against them as they are merely the registered owner and contractor respectively and were not the ones who granted the planning permission as in the case of the first respondent.

It is now relevant to refer to the facts.

In this writ of summons and statement of claim dated 18 July 1997, the appellant had sought a declaratory order that the building approval given by the first respondent to build on land held under H.S.(M) UK 5108, No. P.T. 138040, Kampong Baharu Gunung Rapat, Mukim Hilir Kinta, in the State of Perak (hereinafter "the said land") belonging to the second respondent is null and void.

The said land previously belonged to the third respondent. He was not served and therefore did not participate in this appeal. The fourth respondent is the contractor engaged by the second respondent to build a two storeyed shop on the said land. The appellant had also sought a perpetual injunction against the second and fourth respondents from proceeding with the construction of the said shop on the said land.

By way of summons in chambers also dated 18 July 1997, the appellant had applied for an interim or interlocutory injunction restraining the second and fourth respondents by themselves, their servants or agents from building on the said land.

The appellant's supporting affidavit averred that she was the owner of Lot 496 which was next to a lane reserve which is now the said land. Apparently, on 24 September 1996, the first respondent had given planning permission to the appellant to construct a two storeyed shop on Lot 496 with side windows overlooking the lane reserve.

However, in June 1997, she discovered that the first respondent had given planning permission to the second respondent to build on the said lane reserve evident by a board to that effect erected on the said land.

Further inquiries revealed that the title deed had been issued to the second respondent in respect of the said lane reserve. It is the contention of the appellant that the said planning permission would mean the appellant would be deprived of the said windows overlooking the lane reserve. It was an

infringement of her rights, the appellant continued, as her corner lot had become an intermediate lot. To top it all, no notice of the planning permission had been served on her.

The argument of the appellant was that the planning permission granted by the first respondent as regards the lane reserve was *mala fide* and a complete violation of the appellant's rights. The infringement of her right to the side windows and not being informed of it was a breach of a fundamental right of natural justice. This, according to her learned counsel, amounted to a nullity as regards the first respondent's decision to grant planning permission to the second respondent citing *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* [1947] 2 All ER 680 in support.

Learned counsel for the appellant submitted that damages were not an adequate remedy and an interlocutory injunction ought to be granted to restrain further construction on the said land until the outcome of the suit.

The reply of the first respondent was that the alienation of the lane reserve was not within their jurisdiction but that of the State Authority as once the second respondent was given an indefeasible title, he is entitled to build subject to planning permission being granted by the first respondent. Their error in this instance, he submitted, was not fatal. It was only a matter of doing slight modifications to the building plans of the appellant subject to making compensation to the appellant referring to sub-s. (7) of s. 25 of the Act for the purpose. He added that the second respondent was also quite willing to compensate the appellant. The said subsection reads:

> (7) If a planning permission or an approval of a building plan is revoked under subsection (1) and the person to whom the permission or approval was granted claims from the local planning authority, within the time and in the manner prescribed, compensation for any expenditure incurred by him in carrying out works to implement the permission or approval prior to its revocation or modification, the local planning authority shall, after giving the person a reasonable opportunity to be heard, offer such compensation to him as the local planning authority thinks adequate.

The learned trial judge was of the view that the second respondent had been issued with a legitimate title deed to the lane reserve adjacent to the appellant's land. Consequently, the second respondent had submitted plans for building approval to the first respondent who the learned trial judge found took a rather cavalier attitude in approving the second respondent's application knowing fully well that there was a strong likelihood that it may infringe the rights of the appellant. Adding insult to injury, no notice was given to the appellant.

The question before the learned trial judge was that if the appellant were to succeed at the trial would she be adequately compensated for the interim continuance of the second respondent's activities? Conversely, if the second respondent was to succeed in the action, the question was whether they would be adequately compensated for the interim injunction imposed.

The learned trial judge, in stating that damages would be an adequate remedy, stressed that the appellant was only deprived of the side windows which may either have to be modified or removed completely. This deprivation due to the alienation of the lane reserve, he added, was the fault of the State Authority who should have been named as a party to the proceedings.

He also found that the first respondent was also at fault for approving the planning permission to the second respondent "in wanton disgrace to the prior planning approvals given to the plaintiff". However, he held that this could be compensated by damages by virtue of sub-s. (8) of s. 25 of the Act which provides:

> (8) Where a planning permission or an approval of a building plan is modified under subsection (1), the local planning authority shall reimburse the person to whom the permission or approval was granted the costs actually and reasonably incurred by him in implementing the modification, being costs that he would not have incurred had the modification not been ordered, and shall compensate him for any loss suffered as a result of the modification.

The learned trial judge further was of the view that if an interlocutory injunction is granted, it would deprive the second respondent, as owner, to build pursuant to valid planning permission granted by the first respondent. Consequently, he held that a modification of the appellant's building plans subject to an award of damages would be the best solution in these circumstances.

We were unanimous in holding that the preliminary objection as regard the period of six weeks did not apply to an application for a declaratory judgment as in this case and that the learned trial judge was right in refusing the injunction based on the reasons he had given. We accordingly dismissed the appeal with costs and ordered that the deposit is to go to the first respondent to account of their taxed costs.